Supreme Court, U.S.
FILED
JUN 17 2002
OFFICE OF THE CLERK

(8)

No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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June 17, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

Amicus Curiae Association of American Railroads (AAR) is an incorporated, non-profit trade association representing the nation's major freight railroads and Amtrak. The AAR incorporates by reference the *Statement of Interest* set forth in its Brief in Support of the Petition for *Certiorari* in this case.

AAR urges the Court to interpret the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, to limit recovery for

[1] No person or entity other than AAR has made monetary contributions toward this Brief and no counsel for any party authored this Brief in whole or in part. Letters of consent by the parties to the filing of this Brief have been filed with the Court.

emotional distress damages related to cancer to cancer victims who display physical manifestations of severe emotional distress, and to require apportionment of damages in FELA cases.

SUMMARY OF THE ARGUMENT

In order to recover damages for negligently inflicted emotional distress under FELA, a plaintiff must demonstrate (1) that the railroad's negligence placed him in a "zone of danger", and (2) some objective evidence of emotional distress. Respondents failed to meet either element with respect to their fear of cancer claims.

First, Respondents have not suffered any "physical impact" related to cancer. This Court has held that asbestos exposure alone does not constitute physical impact. Although Respondents suffered the "physical impact" of asbestosis, that disease process is completely unrelated to cancer, and thus cannot serve to place Respondents in the "zone of danger" for developing cancer. Second, Respondents provided no objective evidence that they actually suffered any cognizable emotional distress as a result of their alleged fear of cancer. Respondents' fear of cancer claims therefore fail as a matter of law.

The court below instructed the jury to make no reduction of damages for the contribution of other causes to Respondents' alleged injuries. This was inconsistent with FELA, which entitles a defendant to an apportionment instruction. The statutory language, as well as the policy and intent that underlie FELA, require that a railroad employer is liable only for those damages caused by its negligence. This Court should enunciate a clear rule which will require FELA juries to apportion damages among different causes of a plaintiff's injury when there is a reasonable basis for doing so, and hold a defendant liable only for that portion of the damages caused by its negligence.

ARGUMENT

I. PLAINTIFFS CANNOT RECOVER FOR EMOTIONAL DISTRESS DAMAGES RELATED TO CANCER UNLESS THEY HAVE CANCER AND SUFFER PHYSICAL MANIFESTATION OF SEVERE EMOTIONAL DISTRESS.

In the last ten years, this Court recognized that the tort of negligent infliction of emotional distress is cognizable under FELA, but twice placed strict limits on the availability of damages. In *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the Court held that proof of genuineness of emotional distress was not sufficient to establish a claim; rather, a FELA plaintiff must first demonstrate availability by showing that his distress resulted from his having been within a "zone of danger" by virtue of either a "physical impact" or "the immediate risk of physical harm". *Id.* at 547-548.

The Court's application of the "availability" test has twice prevented recovery. In *Gottshall*, the emotional distress claims of both plaintiffs[2] failed because the plaintiffs were not within the zone of danger.[3] Three years later, in *Metro-North Com-*

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[2] The *Gottshall* plaintiffs' symptoms included nervous breakdown, inpatient and outpatient psychiatric treatment, forty-pound weight loss, nausea, insomnia, cold sweats, nightmares, suicidal preoccupations and anxiety, major depression and posttraumatic stress disorder. *See Gottshall*, 512 U.S. at 563-564, 566-567.

[3] The Court itself determined that one plaintiff, who claimed that his emotional distress resulted from stressful workplace conditions, was not within the zone of danger because there was no threat or evidence of physical harm. 512 U.S. at 558. The other case was remanded to the Third Circuit, which concluded that that plaintiff, who witnessed the on-the-job death of a coworker, was not in the zone of danger because his working conditions were not "extreme and dangerous enough as to place [him] in immediate risk of physical harm." *Gottshall v. Consol. Rail Corp.*, 56 F.3d 530, 535 (3d Cir. 1995).

muter R.R. v. Buckley, 521 U.S. 524 (1997), the Court held, with regard to asbestos exposure and fear of disease claims, that

> the "physical impact" to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease at a substantially later time - where that substance, or related circumstance, threatens no harm other than that disease-related risk,

id. at 430, and thus denied recovery for emotional distress to an asymptomatic plaintiff "unless, and until, he manifests symptoms of a disease." *Id.* at 427.

This case presents two "fear of cancer" issues left open in the *Buckley* case: (1) Does the "physical impact" of asbestosis place a FELA plaintiff within the zone of danger for cancer? (2) Can plaintiffs who testify only to vague concerns related to cancer, but offer no evidence of physical symptoms of serious emotional distress, recover for negligent infliction of emotional distress under FELA? FELA is silent on both issues; thus, the Court's "duty is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law." *Gottshall,* 512 U.S. at 558 (Souter, J., concurring). The "evolving common law" of both FELA emotional distress and "the elephantine asbestos litigation", *Ortiz v. Fibreboard,* 527 U.S. 815, 821 (1999), requires reversal of the court below.

A. An asbestos-exposed plaintiff who has not been diagnosed with cancer is not within the "zone of danger" for cancer, and therefore cannot recover for negligently inflicted emotional distress.

It is well-established that the same asbestos exposure can cause different diseases, both non-malignant (asbestosis and pleural thickening) and malignant (mesothelioma, lung cancer, and "certain 'other cancers'"). *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 603 (1997). A plaintiff who develops any one of these diseases as a result of a railroad's negligence can recover the full range of damages related to that disease,

including emotional distress or mental anguish related to fear of the disease, as a component of pain and suffering. *See Gottshall,* 512 U.S. at 544. Respondents' claims for fear of cancer are separate from their pain and suffering claims related to asbestosis; because Respondents do not have cancer, their claims are in the nature of negligent infliction of emotional distress or mental anguish, requiring them to prove that Petitioner's negligence resulted in either a "physical impact" or "immediate risk of physical harm", placing them in the zone of danger for cancer.

Buckley makes clear that the only legally cognizable impact Respondents have suffered is the onset of asbestosis. It is equally clear that it is not the asbestosis which places Respondents at risk for cancer. Rather, it is the asbestos exposure—*not* a physical impact, according to *Buckley*—which might—or, more likely, will not—someday result in Respondents developing cancer. The alleged fears of these Respondents, who have asbestosis but not cancer, are no less based on speculation than those of asymptomatic plaintiffs like Buckley; thus, they cannot meet the availability threshold. An examination of the evolving common law demonstrates why this is so.

1. *Asbestosis and asbestos-related cancer are separate injuries.*

Courts dealing with asbestos cases have uniformly concluded, based on unrefuted medical and scientific evidence, that each of the many asbestos-related diseases, although it may develop from the same exposure, is separate and distinct. *See, e.g., Kilpatrick v. Dep't of Labor*, 883 P.2d 1370, 1375 (Wash. 1994) ("Each asbestos-related disease involves a unique pathology . . . and is not, in fact, an aggravation or continuation of a different asbestos-related condition"); *Eagle-Picher Indus., Inc. v. Cox*, 481 So.2d 517, 522 n. 7 (Fla. 1985) (". . . asbestosis and cancer can be . . . considered distinct sibling diseases parented by the same cause . . ."). The recognition of the pathological

distinctions between these diseases has led to widespread application of a "separate-injury" analysis, which provides that each disease which results from asbestos exposure—even the same exposure—is a separate injury for statute of limitations and/or issue preclusion purposes. Justice Ginsburg, then a Circuit Court Judge, applying District of Columbia law, authored the first appellate court opinion recognizing this separation. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982). At least 22 other courts, applying state tort or workers' compensation law, have followed suit,[4] and at least two states have also adopted a form of the separate-injury rule by statute. *See* Ala. Code § 6-2-30(b); Ind. Code § 34-20-3-2(a)(2). Although there are no reported FELA decisions[5]

[4] *See Nelson v. Indus. Comm'n of Ariz.*, 656 P.2d 1230 (Ariz. 1982); *Hamilton v. Asbestos Corp.*, 998 P.2d 403 (Calif. 2000); *Miller v. Armstrong World Industries, Inc.*, 917 P.2d 111 (Colo. 1991); *Capen v. Gen. Dynamics Corp.*, 659 A.2d 735 (Conn. App. 1995); *Sheppard v. A.C.&S. Co.*, 498 A.2d 1126 (Del. Super. 1985); *Eagle-Picher v. Cox*, 481 So. 2d 517 (Fla. 1985); *Fulmore v. CSX Transp., Inc.*, 557 S.E.2d 64 (Ga. App. 2001); *VaSalle v. Celotex Corp.*, 515 N.E.2d 684 (Ill. App. 1987); *Parks v. A. P. Green Indus., Inc.*, 754 N.E.2d 1052 (Ind. App. 2001); *Wilber v. Owens-Corning Fiberglass Corp.*, 476 N.W.2d 74 (Iowa 1991); *Carroll v. Owens-Corning Fiberglas Corp.*, 37 S.W.3d 699 (Ky. 2000); *Pierce v. Johns-Manville Sales Corp.*, 464 A.2d 1020 (Md. 1983); *Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1 (Mich. 1986); *Stillson v. Peterson & Hede Co.*, 454 N.W.2d 430 (Minn. 1990); *Devlin v. Johns-Manville Corp.*, 495 A.2d 495 (N.J. Super. 1985); *Fusaro v. Porter-Hayden Co.*, 548 N.Y.S.2d 856 (N.Y.Misc. 1989); *McNeil v. Owens-Corning Fiberglas Corp.*, 680 A.2d 1145 (Pa. 1996); *Potts v. Celotex Corp.*, 796 S.W.2d 678 (Tenn. 1990); *Pustejovsky v. Rapid-American Corp.*, 35 S.W.2d 643 (Tex. 2000); *Kilpatrick*, 883 P.2d 1370 (Wash. 1994); *Sopha v. Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627 (Wisc. 1999).

[5] A number of trial courts have, in unreported orders, granted motions *in limine* similar to the one denied by the trial court below. Copies of these motions have been lodged with the Court. The order of the U.S. District Court for the Southern District of Georgia which specifically held that "[c]ancer and asbestosis are separate and distinct diseases" was recently affirmed on other grounds by the Eleventh Circuit. *See Jones v. CSX Transp., Inc.*, 287 F.3d 1341 (11th Cir. 2002).

dealing with the separate-injury distinction, the *Wilson* analysis has been adopted in a Jones Act case. *Wagner v. Apex Marine Ship Mgt. Corp.*, 100 Cal.Rptr.2d 533, 539 (Cal. App. 2000), *rev. denied*, 2001 Cal. LEXIS 50 (Cal. 2001).[6]

2. *The common law separate-injury rule provides for full recovery for each distinct asbestos-related injury, reduces speculative claims, preserves finite resources for those who develop disease, and should be adopted in FELA cases.*

The courts cited *supra* understood that the recognition of legally distinct injuries—and thus separate causes of action - for the various "sibling diseases parented by the same asbestos exposure" is an important component of the judicial response to "the asbestos litigation crisis". *See Amchem*, 521 U.S. 591, 597 (1987). The pioneer courts in the asbestos cases were required to grapple with the pathology of separate diseases, long latency periods and constantly emerging epidemiological information about risks, and to tailor traditional tort rules to these unique aspects of asbestos litigation. The competing policies of providing injured plaintiffs with full recovery, denying speculative claims, and preserving finite resources for individuals who might yet become sick, have been evaluated and re-evaluated throughout this period.

The *Wilson* case is an excellent demonstration of the pioneer courts' efforts to balance these competing interests. That decision squarely rejected the notion that an asbestotic can sue "not only for asbestosis, but for consequences that might develop later, including separate and distinct illnesses such as mesothelioma or another form of cancer," *Wilson*, 684 F.2d at 117, concluding that a plaintiff could not, and should not, recover in an asbestosis suit for damages related to cancer which

[6] The Jones Act incorporates the substantive provisions of FELA, and precedent under one Act governs cases brought under the other. *Kernan v. American Dredging Co.*, 355 U.S. 426, 431-32 (1958).

would likely never develop. The court held that even if the likelihood of later disease were greater than 50%, it was nonetheless inequitable to allow increased risk claims in asbestos cases because "[p]ersons who contract the first, but not the second, disease will receive a windfall and, in the aggregate, the defendant will overcompensate the injured class." *Id.* at 346 n. 45.

The *Wilson* separate-injury analysis strikes a sound balance between competing policies. Its adoption would enable Respondents to recover all damages resulting from their asbestosis, but would permit no present recovery related to a disease they do not have. If any Respondent develops cancer, he would be able to sue again, and seek recovery for all cancer-related damages, including emotional distress. The rule allows for full recovery, requires no speculation, and does not provide compensation for diseases Respondents do not have and may never develop.

Unfortunately, in the years before the *Buckley* case, even courts adopting the *Wilson* analysis incongruously allowed asbestotics to recover for fear of cancer. For example, in *Cox*, the court adopted the separate-injury rule and policy based on its concern about "[t]he speculative nature of the prediction of future damages."[7] *Id.* 481 So.2d at 524, *citing Wilson*, 684 F.2d 111. Anticipating the explosion of asbestos litigation, the court correctly concluded that asbestotics cannot recover for increased risk of cancer:

> Given the immensity of the demands made and yet to be made upon asbestos litigation defendants, the finite resources available to pay claimants in mass tort litigation, and the real danger that over-compensation of early claimants who may not contract cancer will deplete those finite resources to the detriment of future claimants who do, public policy requires that the resources available for those persons who do contract cancer not be awarded to those whose exposure to asbestos has merely increased their risk of contracting cancer in the future. . . .

[7] The court specifically noted that it was not important to determine what degree of certainty was "reasonable" for purposes of predicting future damages: "It is, no matter what the required quantum of proof, a prediction." *Id.* at 524 n.10.

Cox, 481 So.2d at 525-526. Despite the court's reservations about the speculative nature of awarding damages for *risk* of cancer, it nonetheless allowed recovery for *fear* of cancer, reasoning that the "physical impact" of inhalation of asbestos placed the plaintiff within the "zone of danger" for recovery. *Id.* at 526-527.

Seventeen years later, it is obvious that the *Cox* court—and the court below, J.A. 573—drew the line in the wrong place. The concerns about huge demands, finite resources, and "the real danger that over-compensation of . . . claimants who may not contract cancer will deplete those finite resources to the detriment of . . . claimants who do," *id.* at 526, combined with the logic of the separate-injury analysis, are best addressed by a line drawn between damages related to the disease the *Cox* plaintiff had—asbestosis - and damages related to the disease he did not have and likely never developed—cancer. Asbestos suits have indeed exploded, resulting in widespread bankruptcies.[8] Allowing recovery for fear of cancer no doubt contributed to this disaster. Most who recovered for fear of cancer never got the disease; many who now have it are denied recovery because the defendants who paid fear of cancer damages are no longer solvent. These developments, and this Court's decision in *Buckley*, demand that the line belongs elsewhere in FELA cases.

[8] *See* Brief of *Amici Curiae* Coalition for Asbestos Justice, *et al.*, Part II. A.

3. *This Court's* Buckley *decision precludes recovery for negligent infliction of emotional distress by those who have not developed the disease they fear.*

The *Buckley* decision and the separate-injury rule foreclose the notion that fear of cancer damages are available to an asbestotic simply because he has suffered the "physical impact" of asbestos exposure. *First*. *Buckley* unequivocally held that asbestos exposure is not a "physical impact", even though it results in increased risk of disease. 521 U.S. at 430. Exposure alone cannot entitle Respondents to any recovery based on their fear of contracting cancer. *Second*. The Court noted that "the law . . . does permit recovery for emotional distress where that distress accompanies a physical injury," *id.* at 430, citing *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996), a case which limited recovery of cancer-related emotional distress to persons who actually have cancer. *Third*. The Court emphasized that a disease-free plaintiff would not fall under the common-law rule "permit[ting] a plaintiff who suffers from a disease to recover for *related* negligently caused emotional distress.," *id.* at 432 [emphasis added], citing back to its discussion of *Simmons*. *Fourth*. The "physical impact" of asbestosis is medically irrelevant to the development of cancer. Asbestotics may or may not develop cancer; cancer victims may or may not have asbestosis. *Fifth*. An asbestotic's fear of developing cancer from his asbestos exposure is no less based on speculation than that of a heavily-exposed asymptomatic worker like Buckley.

The court below disregarded the *Buckley* analysis. Instead, it transformed *Buckley*'s holding that "*a* disease" is an essential prerequisite to recovery under any of the "special categories" of exceptions to the bar on recovery of emotional distress damages, *Buckley*, 521 U.S. at 429, into an unsupportable holding that "*any* disease" resulting from asbestos exposure constitutes a "physical impact" under the *Gottshall* test, thus allowing a worker exposed to a carcinogen to recover for fear of cancer

when he develops any exposure-caused condition, however unrelated to cancer. The three "general policy reasons" cited by the Court in *Buckley*, 521 U.S. at 434, in addition to the oft-expressed concerns about the asbestos litigation crisis, do not support this strained interpretation.

4. *Adoption of a bright-line standard that allows only plaintiffs with cancer to recover for cancer-related emotional distress is the only resolution consistent with the law and policy of* Buckley.

The adoption of a bright-line standard—no cancer, no recovery for cancer emotional distress—accomplishes the same result as the *Buckley* "no disease, no recovery for emotional distress" bright-line standard. Such a rule will eliminate the "special 'difficulty for judges and juries' in separating valid, important claims from those that are invalid or 'trivial.'" *Buckley*, 521 U.S. at 433. Moreover, the limitation of cancer emotional distress claims to cancer victims relieves judges and juries of the impossibly subjective task of choosing which fears are reasonable, which fears are related to asbestosis, and which fears are held universally by all who worry about getting cancer.

Denying fear of cancer recovery to plaintiffs without cancer will also reduce the "threat of 'unlimited and unpredictable liability'" to the nation's railroads. *Id.* at 435. In the non-FELA context, widespread recovery for fear of cancer has no doubt contributed to the bankruptcies of asbestos manufacturers. The judicial concern that finite resources would be depleted by awarding those who do not develop cancer at the expense of those who do already has come to pass for the thousands of cancer victims who were not diagnosed before the bankruptcies occurred. The adoption of the "no cancer, no recovery" rule for

FELA will prevent the same disaster for railroad workers and their employers, which have become, in the wake of the manufacturers' bankruptcies, a prime target for asbestos suits.[9]

Finally, denying recovery for fear of cancer to plaintiffs without cancer will at least lessen "the 'potential for a flood' of comparatively unimportant, or 'trivial' claims." *Id.* This Court has recognized that plaintiffs suing for future consequences are far different from plaintiffs who are already sick. *Ortiz*; *Amchem*. The practice of inserting fear of cancer into the cases brought by those who have not developed the disease has answered the question posed by the Court in *Buckley*, 521 U.S. at 435-436:

> In a world of limited resources, would a rule permitting immediate large-scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?

The answer to the question is a resounding "YES".

5. *The post-*Buckley *law and policy deny recovery for fear of cancer to those who have not developed the disease.*

Courts faced with asbestotics seeking recovery for fear of cancer since the *Buckley* decision have adopted a bright-line standard which denies these claims. In 1997, the Pennsylvania Supreme Court confirmed that it would no longer allow recovery for increased risk and fear of cancer where a plaintiff suffered from asbestosis, but not cancer:

> We [have] held that a plaintiff asserting a non-cancer, asbestos-related claim could not recover for any part of the damages relating to cancer. This holding abolishes claims

[9] Asbestos suits accounted for about 23.7 percent of all FELA suits filed from 1996-2000, and an incredible 45.2 percent of all FELA suits filed in 2000. Data compiled from AAR surveys of railroads.

> for . . . fear of cancer where cancer is not present, thus eliminating the recovery of damages based on a speculative future event, the possible occurrence of cancer.

Cleveland v. Johns Manville Corp., 690 A.2d 1146, 1150 (Pa. 1997), *citing Simmons*, 674 A.2d 232 (Pa. 1996) (holding that asymptomatic asbestos plaintiff could not recover for fear of cancer).

Based on similar analysis, and this Court's decision in *Buckley*, the Georgia Court of Appeals has held in a FELA case: "Under Georgia law, and the United States Supreme Court's ruling in *Metro-North Commuter R. Co. v. Buckley, supra* a plaintiff may not recover for emotional distress arising from a fear of contracting a disease until he begins to manifest symptoms of *the* disease." *Fulmore v. CSX Transp., Inc.*, 557 S.E.2d 64, 75 (Ga. App. 2001) [emphasis added].

Allowing fear of cancer recovery for plaintiffs without cancer expands the scope of FELA liability in direct contravention to the policies expressed in *Gottshall* and *Buckley*. The Court must take this opportunity to clarify the FELA rule to preclude fear of cancer claims by those who don't have cancer. The strict limitations placed by this Court on recovery of emotional distress damages, the uniformly accepted separate-injury analysis, the policies in favor of full recovery and opposed to speculative damages, the evolving common law, and the concerns raised by the asbestos litigation crisis all support a decision by this Court which would (1) adopt the separate-injury rule for FELA cases, allowing plaintiffs a separate cause of action for each distinct asbestos-related disease they develop, and (2) limit emotional distress damages to those related to the plaintiff's diagnosed disease. Therefore, this Court should hold, as a matter of law, that Respondents without cancer cannot recover emotional distress damages related to cancer, including those for fear of getting cancer in the future.

B. Respondents' claims also fail because they have submitted no objective evidence of severe emotional distress related to their alleged fear of cancer.

AAR urges the Court to adopt the separate-injury rule, which will result in both a denial of Respondents' emotional distress claims related to cancer and a preservation of a cause of action for all damages related to cancer if they later develop asbestos-related cancer. Therefore, this Court should address the merit issue in this case and, in accordance with the arguments in Petitioner's brief, hold that FELA plaintiffs must demonstrate physical manifestations of severe emotional distress in order to recover. Adoption of this rule is in keeping with this Court's limitation of FELA emotional distress damages in *Gottshall* and *Buckley* in light of the policy of ensuring recovery only for meritorious claims.

II. THIS COURT SHOULD ESTABLISH A RULE REQUIRING APPORTIONMENT OF DAMAGES IN FELA CASES WHENEVER THERE IS A REASONABLE BASIS FOR DOING SO

Railroads pay a substantial amount each year to compensate employees under FELA.[10] This is largely the result of the liberal damages available under FELA[11] and the impact of this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352

[10] During the five year period from 1996 through 2000, railroads paid out an average of three-quarters of a billion dollars annually to FELA claimants.

[11] Under FELA, damages are uncapped and a damage award will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2nd Cir. 1993). In contrast, under the workers' compensation laws, compensation awards are based on a percentage of the average wages with a maximum limit. A. Larson & K. Larson, *Larson's Workers' Compensation Law* § 1.03[5] (2000 ed.).

U.S. 500, *reh'g denied*, 353 U.S. 943 (1957), which held that FELA cases are to be submitted to the trier of fact if there is any evidence that "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506. Moreover, many courts, such as the court below, have misinterpreted *Rogers* to promote and maximize recoveries far beyond what was intended by this Court in *Rogers* or by Congress in enacting FELA.

Respondents alleged that they were negligently exposed to asbestos-containing products while employed by the railroad which caused them to suffer harm. It was established that two Respondents were exposed to asbestos-containing products—for a far greater period—during their employment at non-railroad jobs. Given this evidence, and the policy behind FELA, damages should have been apportioned among the different sources of exposure, with the railroad liable only for the portion of the damages caused by its negligence. However, the court below refused to permit the jury to consider apportionment, rendering the railroad responsible not only for the damages allegedly caused by exposure during railroad employment, but also for the damages caused by the many years of exposure from other sources. Holding railroads liable for damages they did not cause is contrary to FELA and common law.

Notwithstanding the relaxed standard of causation established in *Rogers*, there is no basis in FELA for imposing liability on a railroad for damages it did not cause. Misinterpretation of the *Rogers* holding [12] has led to inconsistent

[12] *See e.g., Farmer v. Pennsylvania R.R.*, 311 F.Supp. 1074, 1077 (W.D. Pa. 1970) and *Denton v. Southern Ry.*, 854 S.W.2d 885, 888 (Tenn. App. 1993)(holding that under *Rogers*, "other causes do not affect the recovery against the employer."). An even more egregious example of the misapplication of *Rogers* is the distortion of the principle of ordinary negligence. *E.g., Kelson v. Cent. of Georgia R.R.*, 505 S.E.2d 803, 808 (Ga. App. 1998) (holding the railroad owes a duty of "great care" to its employees).

rulings on the question of FELA apportionment. This court should enunciate a clear rule permitting FELA defendants to submit, and juries to consider, all relevant evidence of the cause or causes of plaintiff's injury or condition, and requiring juries reasonably to apportion damages between those caused by the railroad's negligence and those not caused by the railroad's negligence.

A. The common law on which FELA is based requires apportionment of damages between those caused by the negligence or fault of a party and those caused by other factors.

The policy underlying apportionment is that no party should be liable for harm it did not cause. Restatement (3d) of Torts: Apportionment of Liability, Topic 5 at 321 (1999). ["Restatement (3d)"]; *U.S. v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2nd Cir. 1993). This Court was no doubt aware of this common law principle, and gave no indication that it should be altered, when it held in *Rogers*, that in FELA cases, the employer is liable for those damages due "in whole or in part to its negligence". *Id.* at 507.

FELA is to be interpreted in accordance with common law principles, except where the common law has been modified by Congress. *Gottshall*, 512 U.S. at 543-44. Where an issue is not addressed by express statutory language, courts are to look toward "developing legal principles." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 570 (1987), with due consideration being given to the common law principles prevailing at the time of FELA's enactment.[13] The common

[13] *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1989) (prejudgment interest not available under FELA as it was generally not available at common law when FELA was enacted). At the time FELA was enacted, damages, if they were to be awarded at all, were to be apportioned among the varying causes of a harm. See Petitioner's Brief, Part II.B.

law sanctions apportionment of damages among multiple causes when there is a reasonable basis for determining the contribution of each cause to a single harm. Restatement (3d); *See also* W. Page Keeton, *et al.*, Prosser & Keeton on the Law of Torts, § 52 (5th ed. 1984). Once it is determined that the defendant's conduct has been the cause of injury sustained by the plaintiff, a further question may arise as to the portion of the total damages which may be properly assigned to the defendant. *Id.* at 345-46.

B. Apportioning damages in FELA cases is consistent with the intent and purpose of FELA.

At first blush, the question of whether FELA damages may be apportioned among those causes attributable to railroad negligence and those attributable to other causes, unrelated to the railroad's conduct, brings into conflict two principles that guide FELA: on the one hand, FELA has been interpreted as a broad remedial statute, to be liberally construed in favor of recovery;[14] on the other hand, the words of the statute expressly limit rail carrier liability only to "a person suffering injury *while he is employed by [a] carrier . . .*" 45 U.S.C. §51 [emphasis added]. However, careful review of the statute and its underlying policy demonstrates that no such conflict exists. In fact, the construction given FELA by this Court militates in favor of permitting apportionment of damages in all cases where there is a reasonable basis in the evidence to do so.

FELA was enacted at a time when working in the railroad industry was undoubtedly hazardous, and resulted in a great human toll.[15] Moreover, the common law of negligence had

[14] *E.g., Hane v. National R.R. Passenger Corp.*, 110 F.3d 573, 574 (8th Cir. 1997); *Green v. River Term. Ry. Co.*, 763 F.2d 805, 806 (6th Cir. 1985).

[15] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, *Statistics of Railways in the United States* 1908, pp. 41, 99 (1909). Today,

erected a number of often insurmountable barriers as obstacles to recovery for injuries sustained by workers.[16]

Against this backdrop, Congress enacted FELA, initially in 1906, and, after addressing constitutional flaws in the original statute, again in 1908,[17] to address the perils posed by railroad employment and to provide a remedy to employees who suffered injury or death as a result of that employment. *Gottshall*, 512 U.S. at 542 (the primary focus of Congress when enacting FELA was "injuries and death resulting from accidents on interstate railroads.") *See also Tiller v. Atlantic Coast Line*, 318 U.S. 54, 58 (1943); *Urie v. Thompson*, 337 U.S. 163, 181 (1949).

The fundamental policy embodied in FELA was premised on the common law principle that railroads were to be liable in damages for injuries sustained by employees in the course of their railroad employment caused by the negligence of the railroad. To ameliorate some of the harsh results which were a consequence of prevailing legal doctrine, Congress modified some aspects of the existing common law in an effort to promote recovery.[18] It is indisputable that Congress envisioned

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the rail industry's safety record is immensely better. *See Federal Railroad Administration, Railroad Safety Statistics, Annual Report 2000.* (July 2001) (In 2000, there were 24 deaths and 8,423 injuries. p. 47 tbl. 4-2).

[16] Any contributory negligence by the plaintiff usually barred recovery. *E.g., Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824). Recovery also was denied if the workers knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Souix City R.R.*, 9 N.W. 581 (1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875).

[17] *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908); *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

[18] The defenses of contributory negligence, assumption of the risk and the fellow servant doctrine were all eliminated by FELA. 45 U.S.C. §53; 45 U.S.C. §54; *see also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916).

that the remedy available under FELA would be consistent with the common law concept of negligence, a principle that has consistently been recognized by this Court.[19]

In addition to the express changes to the common law made by Congress in enacting or amending FELA, *see supra* note 18, this Court has determined that FELA made an additional significant modification to the common law, holding that "a relaxed standard of causation applies under FELA." *Gottshall*, 512 U.S. at 542 (citing *Rogers*); *see also Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108 (1963); *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 (2nd Cir. 1996). Lower courts have seized on the *Rogers* ruling to permit questions of causation to go to a jury on scant evidence and to permit juries to engage in inferences and speculation to support a finding of liability that would not be permitted in negligence cases arising under other laws. *E.g., Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987); *Pehowic v. Erie Lackawanna R.R.*, 430 F.2d 697 (3d Cir. 1970); *see also Marchica v. Long Island R.R.*, 31 F.3d 1197, 1207 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995).

The causation standard grafted onto FELA permits juries to award damages against a railroad where the proof would not sustain such a finding in a traditional common law negligence suit. As interpreted by this Court, the "in whole or in part" language of §51 serves a "gatekeeper" function: if the employer's negligence can be shown to have played some role in producing the injury, the jury may find a railroad liable to the plaintiff. However, this is a separate and distinct question from determining the portion of the total damages for which the railroad may be liable. In considering that question, the jury

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[19] In *Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916), this Court observed that the rights and obligations under FELA "depend upon applicable principles of common law. . . . Negligence by the railroad is essential to a recovery." *See also Buckley*, 521 U.S. at 429 (FELA "liability rests on 'negligence'" quoting *Gottshall*, 512 U.S. at 543).

must be given an opportunity to consider other causes of the employee's injury so that they award no greater damages against a railroad than are warranted by the railroad's negligent conduct. There was no discussion of apportionment in *Rogers*, nor any suggestion that FELA was meant to hold a railroad liable for damages it did not cause.

Apportionment of damages in FELA cases is required by both the common law and the statutory mandate that liability is imposed for injuries "suffer[ed] while employed by [a railroad] carrier." FELA was never meant to guarantee that injured rail workers would always be made whole irrespective of the cause or causes of their injuries or that railroad employers were to be the "insurer" of their employees' health and safety. *Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947).

C. Although the common law principle of apportionment is recognized in many FELA cases, it is rejected by other courts, such as the court below, leading to harsh and inequitable results.

In FELA cases, damages must be apportioned in accordance with the proportionate share of negligence of the railroad employee and the employer. 45 U.S.C. §53.[20] Although the employee's negligence does not bar a claim, if that negligence results, in whole or in part, in the employee's injury or death, it must be compared with the negligence of the employer, and a percentage of fault must be apportioned to the employee.[21]

[20] However, proof of violation of certain safety statutes or regulations establishes negligence on the part of the railroad employer and also precludes any reduction of damages due to the employee's comparative negligence. 45 U.S.C. §53.

[21] If plaintiff's negligence is the sole cause of injury, the defendant has no liability under FELA. *Grand Trunk Ry. Co. v. Lindsay*, 233 U.S. 42, 47 (1914); *Wise v. Union Pac. R.R.*, 815 F.2d 55 (8th Cir. 1987); *Chicago, St. P., M. & O. R.R. v. Arnold*, 160 F.2d 1002 (8th Cir. 1947).

Seaboard Air Line v. Tilghman, 237 U.S. 499 (1915). The percent of negligence apportioned to the employee diminishes the employee's damages proportionally.[22]

Similarly, juries in FELA cases are routinely instructed that railroad employers are not liable for damages attributable to preexisting injuries or conditions, or subsequent injuries or conditions unrelated to the railroad's negligence. *Sauer v. Burlington N. R.R.*, 106 F.3d 1490, 1494 (10th Cir. 1996); *Stevens v. Bangor and Aroostook R.R.*, 97 F. 3d 594, 596 (1st Cir. 1996); *Varhol v. Nat'l R.R. Passenger Corp.*, 909 F.2d 1557, 564-65 (7th Cir. 1990) (en banc); *Harris v. Norfolk Southern*, 319 F.2d 493, 496 (4th Cir. 1963), *cert denied*, 375 U.S. 985 (1964). Moreover, causes of injury or damage unrelated to the incident made the basis of the FELA claim have been recognized as a basis for apportioning damages, either as caused by the negligence of the employee or as an independent cause of the employee's injury or damages. *Paul v. Missouri Pac. R.R. Co.*, 963 F.2d 1058 (8th Cir.) *cert. denied*, 506 U.S. 999 (1992); *Taylor v. Burlington N. R.R.*, 787 F.2d 1309 (9th Cir. 1986); *Harris v. Illinois Cent. R.R.* 58 F.3d 1140 (6th Cir. 1995); *Dale v. Baltimore & Ohio R.R.*, 552 A.2d 1037 (Pa. 1989).

Many courts have properly permitted the jury to apportion the damages between the railroad's negligence and other conduct or conditions causing or contributing to cause the

[22] If other defendants settle prior to verdict, *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994) requires that the settling parties' liability be apportioned so that the non-settling parties are only liable for their proportionate share of damages. *See Great Lakes Dredge & Dock v. Robert Walt Miller*, 92 F.3d 1102 (11th Cir. 1996) applying the *McDermott* rule in a Jones Act case. The court below did not apply the rule in *McDermott*, but instead gave defendant an offset for 75% of the prior settlements on a "dollar for dollar" basis rather than proportionate share basis as required by *McDermott*.

plaintiff's injury. The Tenth Circuit underscored this principle in *Sauer*, reasoning that:

> Although apportionment may be difficult, like comparative negligence it is a question for which juries are well suited. . . . Apportionment can be proved without expert testimony stating the percentage of injury attributable to the different causes.

In *Sauer*, given the pre-existing condition from which the plaintiff suffered, the jury was instructed to "reduce the damages by the likelihood that [plaintiff] would eventually have suffered the injury even if the accident had not occurred." *Id.* at 1495. The jury apportioned seventy-five percent of plaintiff's injuries to pre-existing conditions and prior accidents to reduce plaintiff's damages. Permitting such a reduction effectuates FELA's intent that the employer is only liable for the injury or damage caused by its negligence. *See Shupe v. N.Y. Cent. Sys.*, 339 F.2d 998, 1000 (7th Cir.), *cert. denied,* 381 U.S. 937 (1965).[23]

In *Dale* there was evidence that the plaintiff's lung condition was caused by a pre-existing lung disease. *Id.* at 1038. Recognizing that the prior disease was not attributable to the railroad's conduct, the Supreme Court of Pennsylvania ruled that the jury should have been instructed to apportion damages between the prior condition and any damage caused by exposure to asbestos while an employee of defendant. *Id.* at 1041.

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[23] Similarly, in *Taylor*, the Ninth Circuit held that because plaintiff had physical disabilities, and used drugs, the defendant was entitled to an instruction requiring the jury to consider "the independent- causes of Taylor's mental illness" in "order to reduce [defendant's] liability." 787 F.2d at 1314. In *Varhol*, the Seventh Circuit held that where plaintiff had a pre-existing condition, the trial court properly instructed the jury "to determine what portion of [plaintiff's] condition . . . resulted from the derailment" and award damages only for the aggravation. 909 F.2d at 1564.

> [W]e hold that an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

Id.

The Seventh Circuit took a similar position in *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987). In *Lancaster*, there was evidence that the defendant's tortious conduct contributed to the plaintiff's schizophrenia. *Id.* at 811. There was also evidence that the schizophrenia would have been set off by other events later in plaintiff's life. *Id.* Although the court did not reverse, it stated that the jury should have been given a specific instruction regarding apportionment of damages between the various causes. *Id.* at 823.[24]

Juries are well suited to make decisions regarding apportionment, and expert testimony precisely apportioning the injury on a percentage basis is not required to apportion damages between various causes. *Lancaster*, 773 F.2d at 823; *see also Sauer*, 106 F.3d at 1494:

> When there is evidence that defendant's negligence aggravated a pre-existing condition but expert testimony does not precisely apportion the injury, apportionment is an issue for the jury.[25]

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[24] *See also Akers v. Norfolk & W. Ry. Co.*, 417 F.2d 632 (4th Cir. 1969) (railroad not responsible for damages for condition existing prior to work-related injury); *Kichline v. Consol. Rail Corp.*, 800 F.2d 356, 361 (3rd Cir. 1986)(jury must apportion the extent of aggravation of the injury between time period barred by statute of limitations and period not barred by statute of limitations, with the damages award limited only for the latter period).

[25] Other courts, however, have refused to permit apportionment of damages, clinging to the erroneous notion that Congress intended to hold

The court below essentially instructed the jury that FELA mandates that an employer is responsible for compensating its employees for damages it did not cause. Following this instruction, the jury returned verdicts for the plaintiffs averaging nearly $1 million each. In addition to erroneously instructing the jury that it could not consider the fact that other exposures may have caused a portion of the plaintiffs' damages, the court suggested that it would make any appropriate deductions, leaving the jury with the belief that its award would be reduced for those exposures. The effect of the ruling below is to sweep within the confines of FELA every harm or wrong suffered by a rail employee at any time in his or her life, from any cause, so long as minimal evidence of railroad negligence can be connected to the harm suffered. This does not reflect the intent of FELA; moreover, "[t]his is not equity, . . . but a windfall." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 280 (Blackmun, J. dissenting), *cert. denied,* 449 U.S. 889 (1979).

Where a defendant's liability is not based on traditional notions of causation, the harsh results which may obtain should be ameliorated by a rule permitting apportionment of damages where there is a reasonable basis for doing so. Outside the context of FELA, courts have recognized this principle. For example, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, imposes liability for clean-up costs on generators of hazardous substances without the need to show that the defendant's conduct proximately caused the damages, 42 U.S.C. § 9607; *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252,

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railroads liable for all damages suffered by employees notwithstanding that they arose from causes independent of the railroad employment. *E.g., Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1134 (5th Cir. 1995); *Lockard v. Missouri Pac. R.R.* 894 F.2d 299, 305 (8th Cir. 1990); *Gaulden v. Burlington Northern , Inc.*, 654 P.2d 383, 391 (Kan. 1982).

264 (3d Cir. 1992).[26] In *Alcan*, the Third Circuit acknowledged the potential for "unfair imposition of liability" under CERCLA, *id.* at 267, and, relying on the Restatement, held that the defendant must have an opportunity to present evidence to show that the harm for which damages are sought is capable of apportionment among multiple causes and, "if [the defendant] succeeds in this endeavor, it should only be liable for that portion for the harm fairly attributable to it." *Id.* at 269.

Similarly, in *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993), the court held that the defendant must be permitted to introduce evidence on apportionment of damages if there is a reasonable basis for doing so:

> Essentially, the question whether there is a reasonable basis for apportionment depends on whether there is sufficient evidence from which the court can determine the amount of harm caused by each defendant. If the expert testimony and other evidence establishes a factual basis for making a reasonable estimate that will fairly apportion liability, joint and several liability should not be imposed in the absence of exceptional circumstances. The fact that apportionment may be difficult, because each defendant's exact contribution to the harm cannot be proved to an absolute certainty, or the fact that it will require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability.

Id. at 903.

In *Bell*, the court found that pollution of a stream by two or more factories may be treated as divisible in terms of degree, and apportioned among defendants on the basis of evidence of

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[26] Like FELA, CERCLA does not contain an express provision on how damages are to be allocated. CERCLA has been interpreted as requiring courts to determine, in accordance with traditional common law principles, whether joint and several, or some other allocation of liability is appropriate. *Alcan*, 964 F.2d at 268.

the respective quantities of pollution discharged by each. *Id.* Similarly, as in this case, where the plaintiff has allegedly been exposed to a hazardous substance by two or more sources, the railroad defendant must be permitted to present evidence on the comparative level of exposure from each source, or evidence establishing some other reasonable basis for apportionment.

The notion that courts have an obligation to assess damages based on the extent to which a defendant's culpable conduct contributed to the harm has gained favor in American jurisprudence. Eschewing traditional damages rules that result in unfair outcomes, in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), an admiralty case, this Court abrogated the long-standing rule which divided damages equally whenever two or more parties were found to be guilty of contributory negligence regardless of their relative degree of fault. This Court found that in most cases, the prevailing rule "produces palpably unfair results" *id.* at 405, and that the goal of a "'just' and 'equitable' allocation of damages . . . can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible." *Id.* at 411.

Establishing a rule consistent with FELA's intent that railroads are responsible only for damages attributable to their negligence and not for damages attributable to other causes is increasingly important given the trends in FELA litigation. A significant portion of FELA suits now allege long-term exposure to harmful substances [27] or conditions (in some case, conditions that are consistent with the normal aging process).[28] Often, as in the case below, the condition alleged is caused

[27] *See e.g., Baker v. Norfolk & W. Ry.*, 514 S.E. 2d 448 (Ga. App. 1999)(alleging exposure to diesel exhaust caused cancer).

[28] Thousands of FELA cases have been filed over the past fifteen years alleging hearing loss, a condition that also often accompanies the aging process.

or contributed to by factors that are not related to the railroad workplace.

The perils of railroad work do not include the perils of being exposed to harmful substances at other jobs, the health risks of smoking, or of dangerous hobbies.[29] To assure that FELA does not become a health and welfare insurance policy for rail workers—something it was never meant to be—where there are causes other than the railroad's negligence responsible for the employee's injury a jury must be permitted to apportion the damages between the railroad's negligence and the other cause(s), where there is a reasonable basis for doing so.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court below.

Respectfully submitted

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June 17, 2002

[29] *See Paul; Zarrow-Smith v. New Jersey Transit Rail Operations*, 953 F.Supp. 581 (D.N.J. 1997); *Taylor*.